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ABSTRACT

The question of why advertisements for contraceptives are not shown on television in the United States is explored in this paper. The statement is made that although television is permeated with sex, network broadcasters steadfastly ban contraceptive advertising from the airways on the grounds that they do not want to alienate or offend viewers. Court cases involving the advertising of contraceptives are listed and discussed, and the basic legality of contraceptive advertising is established. The stance of the National Association of Broadcasting is also explored, and the results of a survey of television stations' actions and attitudes on contraceptive advertising are reported. Examples of sample commercials and the television survey are included. (DF)

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Advertising Division

THE CURIOUS CASE OF CONTRACEPTIVE ADVERTISING:

DEBATE OR DEBACLE?

by

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THE CURIOUS CASE OF CONTRACEPTIVE ADVERTISING:
DEBATE OR DEBACLE?

An anomalous national debate--or perhaps debacle--has caught advertising in its messy midst.

On one side is the social reality: the United States leads developed nations in teenage pregnancies with a rate more than double that of its nearest contender; its abortion rate equals or exceeds other nations' birth rate, and, the U.S. is the only Western nation where teen pregnancies are increasing. (33)

On the other side is the Puritan mentality: many factions, broadcast media executives included, contend that information about sex education, birth control and contraceptives is a private, personal, parentally-oriented, behind-closed-(Christian)-doors matter, unacceptable for mass communication.

Mirroring both is a media anomaly: television is permeated by sex, both in commercials and in program content, and yet network broadcasters steadfastly ban contraceptive advertising from the airways. In fact, contraceptives remain the sole taboo among personal product advertising on television. (11) Scented feminine hygiene products, including sprays and douches; pregnancy test kits, hemorrhoid preparations, feminine napkins and tampons, adult incontinence products and jock itch rememdies all appear.

The March, 1985 release of the Guttmacher Institute's cross-cultural statistics triggered a second round in this sexual debate, which included passionate points and counterpoints on morning news/talk programs and printed pleas by newspaper columnists (33) on the how, where and when of permissible information on sex and contraceptives.

The first round occurred in the summer of 1984 when Thompson Medical Company attempted to buy network time for Encare, an over-the-counter vaginal contraceptive. Their rebuff by the networks, which claimed they did not want to alienate affiliates and viewers or raise the wrath of religious organizations, aroused a stir of reaction within the advertising industry. (15, 19, 12) That attempt by Thompson, the realization of the dual anomalies and several "givens" prompted the following research.

Given the socio/sexual statistics, given the content of TV programming (some six-and-a-half hours a day of serials alone, programming with a propensity for sexual content, usually illicit) (26) and the undisputed pervasiveness of the medium, plus the fact it is the chosen medium of teens,

given the fact there are no laws prohibiting such advertising, what then is the real basis, in the mid-1980's, for such an ad ban?

This paper attempts to put the present into perspective by examining the legal background of contraceptive advertising, including the Supreme Court's view of its positive possibilities; the paralegal parameters, including the ghost of the National Association of Broadcasters (NAB) Television Code, and, finally, findings of a new survey of television stations undertaken to determine if a potential route around the network ban (spot buys) is possible, or whether the nation's stations would mimic the networks in both actions and reasons.

THE LEGAL BACKGROUND

The current legal stance of contraceptive advertising is deceivingly simple: there are no legal barriers prohibiting it. The Supreme Court has permitted it through repudiation of state statutes prohibiting it. (9) The U.S. Code does not prohibit it. Most states have no laws restricting or regulating dissemination of information, including advertising (29) and, it does not fall under any current advertising regulations of the FTC. (14)

Furthermore, the Court has not only sanctioned commercial contraceptive messages but it has directly addressed the importance of advertising as an information outlet, accorded it First Amendment protection and rights and squelched various arguments about the possible negative effects of birth control advertising. (5, 32)

However, the final roadblocks were dismantled less than a decade ago (9), and legislation before 1977 was fraught with Puritan ethics as a review of the cases will show. Pre-Carey (1977) legislation defined contraceptives as "indecent articles" involving "moral turpitude" (6) and "obscenity."

The federal Comstock laws, originally passed by Congress in 1873, prohibited distribution of obscene or immoral matter, which, until amended in 1971, included contraceptives. (29:72) The states passed their own Comstock laws devised to safeguard the public's morals, particularly those of youth. (29:47)

The Comstock amendments opened the door for print advertising through the statement that "an advertisment shall not be deemed to be unsolicited (which was still illegal) if it is contained in a publication for which the addressee has paid, or promised to pay, or which he has otherwise indicated

he desired to receive." (29) This advancement, however, did not address the question of broadcast media or broadcast advertising.

Given the Comstock laws and prevailing American stance of moral uprightedness, it is no surprise that the courts for years routinely upheld state statutes banning both use and advertising of contraceptives. Of ten cases to come before the courts, eight were decided against contraceptives. New York was the setting for both the first and last cases.

In 1917, New York's statute was upheld in People v. Byrne, 163 N.Y.S. 632. The statute made it a misdemeanor to advertise or offer to sell any article, drug or medication for contraception on the grounds that allowing such devices would increase immorality. The Court also made an eloquent case that the fear of pregnancy is what serves as a deterrant to premarital or illicit sex and removing it "would unquestionably result in an increase of immorality." (21)

That same year, a Massachusetts statute was upheld in Commonwealth v. Allison, 116 N.E. 265 (1917), again on promotion of morals. "Their plain purpose," said the Court, "is to protect purity, to preserve chastity, to encourage continence and self-restraint, to defend the sanctity of the home, and thus to engender in the state and nation a virile and virtuous race of men and women. The subject matter is well within one of the most obvious and necessary branches of the police power of the state." (13)

In 1935, a gasoline station owner was legally chastised by the state of Wisconsin (State v. Arnold, 258 N.W. 843) for selling condoms from a "slot machine." The court not only confirmed the state's definition of indecent articles to include contraceptive devices but said such regulatory statutes were not unreasonable or arbitrary. The Wisconsin law was upheld as late as 1976 in Baird v. LaFollette, 239 N.W.2d 536.

Again in 1935, the Federal Communications Commission made a strong statement against dissemination of contraceptive information of advertising when it almost failed to renew the license of a New York radio station. In RE Knickerbocker, 2 F.C.C. 76 discussed the "perplexing problem" of WMCA's allowing Birconjel to sponsor a program called "Modern Women's Serenade" for "several days during March 1935." Such sponsorship, said the new regulatory commission, "must be termed offensive and contrary to public interest" and the "mere use of the name suggests birth control." (17)

The problem, according to the FCC, was that the advertising virtually eliminated the fine 10-year record of the station. "It was the Commission's original impression that the imposition upon the public of Modern Women's Serenade was so unconscionable as to outweigh the merit of the good record heretofore established." Upon further consideration and careful scrutiny of the past and proposed future conduct, the license was renewed. (17:77-78, 24)

However, by 1944, a softening of public sentiment towards birth control became apparent in another New York case. While the statute prohibiting the selling or advertising of contraceptives was held constitutional because of the "moral turpitude" involved, the court in Barretta v. Barretta, 46 N.Y.S.2d 261 said:

> notwithstanding widely divergent religious, sociological, economic, psychological or physiological viewpoints as to use. . .the statutes and court decisions of New York clearly indicate disapproval. (3)

The New York statute was again upheld in 1965 in People v. Baird, 262 N.Y.S.2d 947.

A clear change in judicial attitude occurred on the opposite coast in 1961 when a California district court of appeals in Application of Schillaci, 16 Cal.Rptr. 757 declared that a statute prohibiting distribution of printed matter relating to venereal diseases except through state agencies was unconstitutional as an infringement of the freedom of the press, and that the publication of beneficial information about drugs or treatments was protected if not obscene. This case marked the first time contraceptive aids were defined as other than obscene. (2)

The Supreme Court of Arizona slapped the face of commercial advertising in 1962 when it found its prohibitive statute did not deny free speech since the only limitation was advertising of specific trade-branded devices. In a suit brought by the Planned Parenthood Committee of Phoenix against Maricopa County, 375 P.2d 719, the court said Planned Parenthood could disseminate its information since it wasn't product-specific advertising, which, it said, did not enjoy the same degree of protection under the First Amendment.

The turning point for contraceptive advertising came in 1977 when the United States Supreme Court quashed as unconstitutional a New York statute that not only prohibited sales of contraceptives to persons under age 16

and limited distribution to that by registered pharmacists but which flatly banned advertising or display of contraceptive devices.

Carey v. Population Services International, 431 U.S. 678, 97 S.Ct. 2010 (1977) centered on a North Carolina mail order house that advertised contraceptives in New York periodicals.

Citing Virginia Pharmacy Board, 425 U.S. 748 (1976), the Court reaffirmed that a state could not completely suppress the dissemination of "concededly truthful information about entirely lawful activity" even when that information could be categorized as "commercial speech" and that "substantial individual and societal interests" were served in the free flow of commercial information. (9:701)

In a benchmark case, the Court legalized contraceptive use, confirmed the First Amendment protection of advertising and blasted the notions that allowing advertising might increase sexual activity, limiting access would discourage early sexual behavior or that increasing the hazards upon sex might deter the act. (9:679)

Perhaps the Court's most significant comment — in application to the current question -- was its decision that prohibition of advertising could not be justified on the grounds that ads of such products would offend and embarrass those exposed to them and that permitting them would legitimize sexual activity of youth.

> These are classically not justifications validating suppression of expression protected by the First Amendment. At least where obscenity is not involved, we have consistently held that the fact that protected speech may be offensive to some does not justify its suppression. As for the possible 'legitimation' of illicit sexual behavior. . .none of the advertisments in this record can even remotely be characterized as 'directed to inciting or producing imminent lawless action and. . .likely to incite or produce such action' (Brandenburg v. Ohio). They merely state the availability of products and services that are not only entirely legal (Pittsburgh Press Co. v. Human Relations Cmm'n) but constitutionally protected (Bigelow v. Virginia). (9:701)

In a footnote to its decision, the court stated that arguments offered to justify prohibitions on commercial speech were "clearly directed not at any commercial aspect of the prohibited advertising but at the ideas conveyed and form of expression -- the core of First Amendment values." (9:701)

In Carey, the Court did reserve the opportunity for future restrictions on advertising. Justice Powell noted that the state does have authority to impose carefully tailored restrictions designed to serve legitimate governmental concerns as to the effect of commercial advertising on the young, "especially. . .when advertising is accomplished by means of the electronic media." (9:712) However, the state, neither through courts nor FCC regulations has used this authority.

Justice Stevens echoed these sentiments with his comment that "the offensive character of the communication (commercial speech) is a factor which may affect the time, place or manner in which it may be expressed." (9:717) However, he strengthened advertising's stance by saying:

> The fact that the advertising of a particular subject matter is sometimes offensive does not deprive all such advertising of First Amendment protection; but it is equally clear to me that the existence of such protection does not deprive the State of all power to regulate such advertising in order to minimize its offensiveness. (9:717, 23)

After reviewing the legal background of contraceptive advertising, one cannot help but wonder if the fact that the networks' location in New York, which three times upheld the illegality and immorality of contraceptive advertising and was the home state for the only FCC procedure to address contraceptive advertising, hasn't played a major role in their reluctance to accept contraceptive advertising. Indeed, such advertising would have been illegal in New York until the 1977 Carey decision.

FIRST AMENDMENT RIGHTS, INFORMATIONAL INSIGHTS

Not only have the courts declared advertising of contraceptives to be legal, they have specially addressed the positive aspects. The Court has found advertising to serve two significant functions: (1) advertising can convey necessary and valuable information, and, (2) the recipients of advertising mutually enjoy its First Amendment rights. Two cases highlight these views.

In the first, Bigelow v. Virginia, 421 U.S. 809, 95 S.Ct. 2222. (1975) the notion of unprotected commercial speech all but vanished from the scene and the informational aspect of this communication form is clearly established.

The case centered on conviction of a weekly newspaper editor for publishing ads for a New York abortion clinic. The Virginia anti-abortion

statute was upheld in Virginia as a valid exercise of police power

> to ensure that pregnant women in Virginia who decided to have abortions come to their decisions without the commercial advertising pressure usually incidental to the sale of a box of soap powder. (5:814)

The Supreme Court confirmed that advertising is "not stripped of First Amendment rights simply due to its commercial considerations."

> The State was not free of constitutional restraint merely because the advertisement involved sales or 'solicitations,' Murdock v. Pennsylvania, 319 U.S. 105, 110-111 (1943), or because appellant was paid for printing it, New York Times Co. v. Sullivan, 376 U.S., at 266; Smith v. California, 361 U.S. 147, 150 (1959), or because appellant's motive or the motive of the advertiser may have involved financial gain, Thomas v. Collins, 323 U.S. 516, 531 (1945). The existence of 'commercial activity, in itself, is no justification for narrowing the protection of expression secured by the First Amendment.' Ginzburg v. United States, 383 U.S. 463, 474 (1966). (5:818)

The Court also directly addressed the informational role by saying that the printed advertisement "did more than simply propose a commercial transaction. It contained factual material of clear 'public interest'. . .viewed in its entirety, the advertisement conveyed information." (5:822)

More importantly, the court downplayed the commercial aspect of advertising communications in two statements directly applicable to the current question:

> The relationship of speech to the marketplace of products or of services does not make it valueless in the marketplace of ideas. (5:826)
>
> The diversity of motives, means and messages of advertising may make speech 'commercial' in widely varying degrees. (5:826)

The second case reiterates the informational aspect with an important new twist, the consumer's right to receive advertising information. In Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 96 S.Ct. 1817 (1976), the Court found that both the individual consumer and society in general may have strong interests in the free flow of commercial information, but, more importantly, that "First Amendment protection enjoyed by advertisers. . .is also enjoyed, and thus may be asserted, by appellees as recipients of such information." (32:748)

"If there is a right to advertise," the Court said, "there is a reciprocal right to receive the advertising, and it may be asserted by these appellees. (32:757)

"Freedom of speech presupposes a willing speaker," said the Court. "But where a speaker exists, as is the case here, the protection afforded is to the communication, to its source and to its recipients both." (32:756)

The Court elevated the stance of commercial speech by saying:

> As to the particular consumer's interest in the free flow of commercial information, that interest may be as keen, if not keener by far, than his interest in the day's most urgent political debate. (32:763)
>
> Advertising, however tasteless and excessive it may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reasons, and at what price. (32:765)

Regarding "private economic decisions," the Court said:

> . . .it is a matter of public interest that those decisions, in the aggregate, be intelligent and well-informed. To this end, the free flow of information is indispensable. (32:765)

Virginia Pharmacy Board, then, broadens the notion that advertising can play an important societal role, thereby elevating its status as a communication form. This tenet seems directly applicable to the anomaly at hand, specifcally, it might be questioned whether private censors should look to the Court's opinion for guidance or guidelines to their own behavior.

A more recent Supreme Court case clearly enunciates the informational aspect of commercial speech and provides another banned advertising case that raises an interesting parallel to the question at hand.

In Central Hudson Gas and Electric Corp. v. Public Service Commission of New York, 100 S. Ct. 2343, 447 U.S. 557 (1980), the Court restated an argument from Bates v. State Bar of Arizona, 433 U.S. 374, that "even when advertising communicates only an incomplete version of the relevant facts, the First Amendment presumes that some accurate information is better than no information at all." It added that even in monopoly markets such as the Central Hudson situation, "the suppression of advertising reduces the information available for consumer decisions and thereby defeats the purpose of the First Amendment." (10)

"Commercial expression," said the Court, which overturned the prohibitive ruling, "not only serves the economic interest of the speaker, but also assists consumers and furthers the societal interests in the fullest possible dissemination of information." (10:2349)

> Even though commercial speech is involved, such a regulatory measure (a prohibition of promotional advertising for gas during a national energy crisis) strikes at the heart of the First Amendment. This is because it is a covert attempt by the state to manipulate the choices of its citizens, not by persuasion or direct regulation, but by depriving the public of the information needed to make a choice. (10:2346)

The Central Hudson ban seems to parallel the networks' ban: the reasoning that a ban equals conservation. A ban on promotional natural gas messages was thought to conserve energy. Does a ban on contraceptive information conserve virginity?

Besides the obvious positive implications of Bigelow and Virginia Pharmacy Board, both cases served an important role in advertising legislation, overturning the "Chrestensen precedent." They negate that 1942 court decision that permitted government restraint on commercial advertising by making prohibitive statues immune to constitutional challenge. (31)

Both cases cite Justice Douglas' comment that the Chrestensen opinion was "casual, almost offhand" and yet had operated to exclude commercial speech from First Amendment protection. Justice Stewart, in a concurring opinion in Virginia Pharmacy Board, flatly wrote that "today the Court ends that anomalous situation." (32:776)

THE PARALEGAL OR POLITICAL PERSPECTIVE

The case law and statutory review establishes the legality of contraceptive advertising today. But even though the legal barrier is removed, the ban remains. Why? Other factors, perhaps paralegal or political, would seem to be at work.

One such factor could be the ghost of the NAB Code, which flatly banned contraceptive advertising. Conduct upholding the standards of the Code seem to continue even though compliance with the Code does not. The Justice Department forced its abandonment in 1982 on anti-trust irregularities. In the consent decree, the district court recognized that the Code, termed voluntary by the NAB, was not "a mere set of advisory standards." (30:149)

> . . .its influence is so pervasive that in real terms it stands between the nation's airwaves and even the most powerful business enterprise. As NAB has said in another forum, 'national advertisers need to insure that commercials are Code compliant in order to gain access to the networks' (emphasis added by the court). (30:165)

In 1978, over 65 percent of all commercial television stations subscribed to the Code, a number accounting for an estimated 85 percent of all television viewing. (30:153)

In the media blitz generated by Thompson after its most recent Encare turndown (28), some advertising writers cited admissions by network executives that they were continuing to follow code guidelines. (15) If true, such habit may be a carry-over from the fact that stations subscribing to the Code and living up to it were awarded a seal of good practice. Assuming that to be a valuable thing, and recognizing it represented the industry's attempt to regulate itself to stave off external regulating, it makes sense that the networks might continue standards which for years were deemed to be the best operational tactics. The problem seems to be in convincing the three networks that such conduct is no longer good practice.

These factors, coupled with a longtime legal definition of contraceptives as obscene or indecent, can be considered to contribute to paralegal reasons why the networks continue to refuse contraceptive advertising.

From a political perspective, other factors surface. For various reasons, either allowing such advertisements by the networks or pushing for them by the advertisers is not politically smart.

Both sides are, in the end, economic animals. Businesses revolve around profits; the networks will avoid offending their affiliates, their viewers (who might stage boycotts or exert media pressure), or other advertisers because the networks want the mass audiences from which they reap profits.

An ABC network standards and practices vice president has said their worry is about the controversiality of the product and its potential for offensiveness, particularly to various religious sects. He also said that such advertising could be considered an invasion of privacy since contraceptive advertising, unlike that for feminine hygiene, deals with a more private act or function that has both religious and moral aspects. (25)

Queried as to the apparent anomaly stemming from the programming and advertising content contradictions, the executive called such an argument "irrelevant" since "two wrongs, as the cliche says, don't make a right. What happens on an individual program on occasion is different than a 30-second message that is highly repetitive." (25)

On the other side are the advertisers. An Encare executive freely admitted that the company would never take the case to court because the company cannot

afford to antagonize the network censors, with whom they have constant business transactions. Such a suit might harm advertising for other products in the line. (18)

There appear to be no legal remedies for advertisers to the ban. Antitrust legislation is generally too narrow, intricate and dependent on price-fixing. Collusion would be difficult to prove. Only one court case stands as an arguable possibility. In Home Placement Service v. Providence Journal Co., 682 F.2d 274 (1982), an advertiser was able to show that none of the alternative media identified by the Court could be said to be "reasonably interchangeable" with, or competing "or substantial parity" with newspapers. (16) Advertisers may be able to beg a similar lack of effective substitute since more media studies are indicating that both the young and the lower class, prime targets for over-the-counter contraceptive information, are strong audiences for televison but not for newspapers or magazines. (27)

SPOT BUY REMEDIES?

The networks claim that one reason they refuse contraceptive ads is for fear of alienating affiliates. Do the affiliates feel the same way about contraceptive advertisng and support the network ban, or, would they allow spot buys on their stations?

To find out, approximately a third (236) of the nation's 870 commercial television stations list in the Broadcasting/Cablecasting Yearbook 1984 were sent a brief contraceptive survey in March, 1985. Stations' names were generated through a simple random sample of the directory. All three network affiliates and at least one independent station from the top 10 ADI markets were also included since those markets account for 33% of the nation's television viewers.

After a second wave of mailing, again to a third of the non-respondents through another simple random sample, 94 stations had responded for an overall response rate of 41%. Although more NBC affiliates responded, responses in general were fairly evenly distributed across affiliation, market size and states (44 states were represented in the returns). Responses by market size and affiliation are shown in Table 1.

The survey inquired about the station's actions and attitudes on contraceptive advertising and specifically asked if the station would air either a commercial for Encare or Trojans condoms, the copy for which was provided in the cover letter explaining the survey. (See letter and survey form in

Table 1. Responses of TV Stations by Size, Affiliation

Market Size	Absolute Frequency	Relative Frequency		
1 - 10	8	8.5%	Top 25	18%
11 - 25	9	9.6		
26 - 50	15	16.0	Top 50	34%
51 - 75	12	12.8		
76 - 100	16	17.0	50-100	30%
101 - 150	18	19.1		
Over 150	16	17.0	101+	36%
	N = 94			

Affiliation	Absolute Frequency	Relative Frequency
ABC	20	21.3%
CBS	20	21.3
NBC	35	37.3
Independent	14	14.9
Religious, ethnic	2	2.2
Unknown	3	3.2
	N = 94	

Appendix 1.)

Findings of TV Station Survey

The following trends were noted in an evaluation of simple frequencies:

Table 2 about here

-- Only four of the 94 stations had ever accepted contraceptive advertising, however, of the 94, a little more than half (N=53, 56%) had never been approached by such advertisers for spot buys.

-- Two-thirds indicated they would not run either the Encare or Trojans commercials, with 29% (N=27) saying they would run Encare and 26% (N=24) saying they would run Trojans.

-- Reasons for not accepting such ads tended to mirror the networks' reasons. The main reason for not accepting contraceptive advertising was "don't want to offend viewers or cause viewer backlash" (36%, N=34). The next three responses, at 28-29% (N=26-27) were "against station policies," "subject is too personal and private," and "continue to follow former NAB Code guidelines which prohibited such ads." Of lesser concern were "strong religious element in community" at 21% (N=20) and "would follow networks' lead in not accepting such products" at 16% (N=15).

-- Conversely, reasons for running such ads were primarily for the possible informational content. Thirty-six checked "as long as spot was not offensive, it could provide valuable information" (38%).

-- Surprisingly, 28% (N=26) of the responding stations indicated they had accepted advertising from such groups as Planned Parenthood, abortion clinics or pro-life organizations.

-- Thirty percent (N=28) indicated they did not agree with the networks' decision not to run contraceptive advertising.

Only one station of the 94 was running contraceptive advertising at the time of the survey. The stations were about split on having policies that specifically addressed such advertising (44 yes, 49 no--

Table 2. Summary of Responses of TV Stations to Contraceptive Survey

March, 1985 N = 94

Question	YES Absolute Frequency	YES Relative Frequency	NO Absolute Frequency	NO Relative Frequency
Ever accepted contraceptive advertising?	4	4%	90	96%
Currently running contraceptive ads?	1	--	--	--
Approached by advertisers for spot buys?	40	43%	53	56%
Contraceptive policies/guidelines at station?	44	47%	49	52%
Accept Encare ad?	27	29%	62	66%
Accept Trojans ad?	24	26%	65	69%
Why not accept such ads:				
Don't want to offend viewers/cause backlash	34	36%		
Against station policies	27	29%		
Subject too personal and private	26	28%		
Continue to follow NAB Code which prohibited ads	26	28%		
Strong religious element in community	20	21%		
Follow networks' lead in not accepting such ads	15	16%		
Why accept such ads:				
As long as spot not offensive, could provide valuable information	36	38%		
Social trends & sexual statistics call for it	20	21%		
Would treat as any other advertiser/product	14	15%		
Content of TV programs call for it	6	6%		
Other	9			
Accepted Planned Parenthood, abortion clinic or pro-life advertising?	26	28%	67	71%
Agree with networks' decision not to run such ads?	58	62%	28	30%

47%, 52%). As for limitations on running either spot, most indicated they wouldinclude time restrictions, most notably during any children's viewing hours and many during early primetime.

Implications of the Survey

This survey indicates that contraceptive advertisers have about a one in four chance of getting their messages on the air through spot buys; that nearly a third of the stations don't agree with the network ban, which may indicate hope for an eventual change in policy; and, that while many see the informational potential of such spots, just as many still prescribe to Puritanical concerns (don't want to offend viewers; subject is too personal) as well as paralegal concerns (NAB Code, station policies).

A CONCLUDING DISCUSSION

In Virginia Pharmacy Board, the Court claimed that the "state's protectiveness of its citizens rests in large measure on the advantages of their being kept in ignorance." (32:769) The same might be said of the networks, if they prescribe (or simply attempt to mirror) the archaic notion that dissemination of contraceptive information would lead to increased sexual activity and that a ban on such messages would equal less promiscuity. The social statistics (including 1980 Guttmacher figures that put the number of sexually active teens who used contraceptives at 1.98 million, with another half million active but unprotected, and with the federal government paying $8.3 billion annually for health and medical costs for teenage mothers) (22)

show otherwise. (22) The court has opined otherwise. (9)

The advertisers who have asked for the privilege of keeping the networks in business through the purchase of air time have offered up relatively conservative spots. The Encare commercial showed four women sensibly and almost clinically discussing a birth control method they liked. (19) Youngs drug Products Corp., which tried to air a Trojans condom commercial in 1975, showed a young couple skipping down a sunset beach, with the message not starting until the 25th of 30 seconds. (1)

These spots are hardly the approach used in a Swedish TV commercial cited in a Wall Street Journal column about the Encare flap.

> The spot opens with a young woman informing Johnny that she has just gone off the pill. Johnny nonchalently asks what she's going to use instead. 'Guess," she replies, then stretches a condom back like a rubber band and snaps it against his bare bottom. (12)

As the article continues, "the U.S. is hardly ready for that." But it is ready for more than a hush-hush policy. Even the networks admit to being "a step behind what the general public will accept." (15)

For the future of contraceptive advertising, the most feasible course appears to be not recourse but reeducation of the networks. Demands for rethinking of the ban can be asserted in continued media blitzes that point out the programming/advertising anomaly.

Clearly, the answer, in the end, seems to rest not in the courts but within what the courts have already decreed. No advocate of advertising could be more persuasive or eloquent in speaking for advertising's positive value to society than the highest court has already been. No marketer could interpret the meaning of First Amendment protection or the intention of the framers better than the Supreme Court already has.

The Court, after all, has realized that commercial messages can arouse perhaps keener interest in a consumer than his interest in even the political chatter of the day. (32:763)

It would seem that the networks would see that the thinking has been done for them and that they would therefore embrace the views of the Court regarding the potential contributions of contraceptive advertising and the lack of potential promiscuity problems.

If all attempts at reasoning fail, perhaps advertisers and audiences should point out to the networks again and again what a Los Angeles Times

columnist declared in a column written during the last blitz:

> When it comes to contraception, though, the television industry itself is like a torn teenager. It's afraid of being accused of selling sex when, of course, it has been doing that all along. In a teenager, that's understandable. In an industry, though, that's both hypocritical and irresponsible.
>
> If contraceptive commercials were aired, at least we would have a different answer to (the) question: What are they selling? (On commercials featuring sexy women in alluring poses.) Easy. An antidote to the other commercials. (Emphasis added.) (12)

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1. Alsop, Ronald. "Contraceptive Companies Test Reacton to TV and Radio Ads." Wall Street Journal 19 July 1984, sec. 2, p.1.

2. Application of Schillaci, 16 Cal. Rptr. 759, citing Smith v. California, 361 U.S. 147: "The publication of obscene matters is not protected. . . but the publication of beneficial information about drugs or treatments is so protected."

3. Barretta v. Barretta, 46 N.Y.S.2d 262.

4. Bartos, Rena and Theodore Dunn. Advertising and Consumers. (New York: American Association of Advertising Agencies), 1976.

5. Bigelow v. Virginia, 421 U.S. 809 (1975).

6. Black Law Dictionary defines moral turpitude as "an act of baseness, vileness or depravity in the private and social duties which a man owes to his fellow men, or to society in general, contrary to the accepted and customary rule of right and duty between man and man; conduct to justice, honesty, modesty or good morals."

7. Burton, Philip W. and Smith, Linda Lazier, Essentials of Advertising. Columbus, Ohio: Grid Publishing, in press (1985). From the chapter "Television: The Truly Mass American Medium."

8. CBS v. Democratic National Committee, 412 U.S. 94 (1973) speaks to this issue. See also Friends of the Earth, 24 F.C.C. 749 (1970), San Francisco Women for Peace, 24 F.C.C.2d 156 (1970).

9. Carey v. Population Services International, 431 U.S. 678 (1977).

10. Central Hudson Gas and Electric Corp. v. Public Service Commissions of New York, 100 S. Ct. 2343.

11. Code News (Vol. 10, April, 1977) details the history of personal product advertising. Prior to its demise, the NAB Television Code had approved, and the networks and stations aired, all other personal products. The history of acceptance includes: eminine deodorant spray powder, 1968; hemorrhoid preparations, 1972; tampon, douche and sanitary napkins, 1972; enema, 1976; pregnancy test kit, 1979; incontinence products, 1980; jock itch advertising, 1980; medicated douche, 1981; external feminine itch products, 1981. The TV Code Review Board found "all personal product categories, except contraceptives, potentially acceptable for advertising" in June, 1972.

12. Cohen, Richard. "Birth Control Spots Might Provide Antidote for Television's Fare." Indiana Daily Student, May, 1984, p. 4.

13. Commonwealth v. Allison, 116 N.E. 266.

14. Federal Trade Commission currently has a variety of regulations concerning false and deceptive advertising and certain specifics for medical compounds. Proposed commercials fall under neither of these broad areas, and, in general, no FTC regulations specifically prohibit this product category but would go into effect only if the content of the ad was, for example, deceptive.

15. Giges, Nancy. "Encare Contraceptives Breaking Ad Barriers." Advertising Age, April, 1984, pp. 3, 79.

16. Home Placement Service v. Providence Journal Co., 682 F.2d 275.

17. In Re Knickerbocker, 2 F.C.C. 77.

18. LePone, Donald. Vice President, Marketing, Encare, Thompson Medical Co., New York, NY. Interview, 2 July 1984.

19. Lippert, Barbara. "Birth Control Ads: Censors Practice Double Standards." Adweek, April 23, 1984, p. 40.

20. Paul, Eve. Attorney, Planned Parenthood Federation of America, New York, NY. Interview, 23 July 1984.

21. People v. Byrne, 163 N.Y.S. 682, from 113 A.L.R. 971.

22. Planned Parenthood Federation of America, Inc., Fact Sheet: Teenagers and Family Planning: The Need for Preventive Services, from research by the Alan Guttmacher Institute and the California Department of Health, issued, June, 1984. The number of women under age 18 "at risk" for pregnancy totals 2.43 million; 1.1 million teens became pregnant in 1980, three-fourths of them unintentionally; only one of seven teens entering a family planning clinic comes before having sexual relations and most have been sexually active for one year before seeking birth control aid or information; the most frequent reason for a teen to visit a family planning clinic for the first time is for a pregnancy test.

23. Rehnquist, Justice, dissented in the Carey decision. He referred to the valiant defense at Bunker Hill in 1775 of men who would later sit in the first Congress and draft the Bill of Rights. "If those responsible for these Amendments, by feats of valor or efforts of draftsmanship could have lived to know that their efforts had enshrined in the Constitution the right of commercial vendors of contraceptives to peddle them to unmarried minors through such means as window displays and vending machines located in the men's room of truck stops, notwithstanding the considered judgment of the New York legislature to the contrary, it is not difficult to imagine their reaction." At 717.

24. Russo, Dorcas. "Advertisements for Contraceptives as Commercial Speech in Broadcast Media," Case Western Reserve Law Review 31 (pp. 336-362) is the only law review article found on the topic of contraceptive advertising. It started with the fact "Since 1935, the Federal Communications Commission has prohibited the advertisement of contraceptives on radio and television." This is in error since the FCC does not prohibit advertising. The reference is to In Re Knickerbocker, cited

above, a license renewal case that centered on contraceptive advertising. The FCC has never had a definite prohibition against such advertising.

25. Schneider, Alfred. Vice President, Standards and Practices, American Broadcasting Company, New York, NY. Interview, 2 July 1984.

26. TV Guide tally from July, 1984.

27. Television Bureau of Advertising, TV Basics 26: The Television Bureau of Advertising's Report on the Scope and Dimensions of Television Today, 1984.

28. Thompson Medical first tried to gain access to network commercial time in late 1982 when it acquired Encare. It was turned down. In spring, 1984, the company tried again, using data from successful airings on independent and cable stations.

29. United States Department of Health, Education and Welfare. Family Planning, Contraception, Voluntary Sterilization and Abortion: An Analysis of Laws and Policies in the United States, Each State and Jurisdiction. Rockville, Maryland: U.S. Government Printing Office, 1978, pp. 72-78. As of September, 1976, 37 states had no law restricting or regulating the dissemination of information (including advertising) about contraceptives. Two more restricted only secret "nostrums." Of the remaining 11, most had provisions exempting certain types of ads. p. 76.

30. United States v. National Association of Broadcasters, 536 F. Supp. 149 (1982).

31. Valentine v. Chrestensen, 316 U.S. 521 (1942).

32. Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976).

33. USA Today, special editorial page, March 20, 1985, p. 8A, including "Youth Need Advice to Act Responsibly;" Murray, Jane, (Guest Columnist), "Sex Education Works Overseas;" Falwell, Jerry (Opposing View), "Keep Contraceptives Away from Teen-agers;" Ellis, Tottie (Opposing View), "Most 'Advice' on Sex Promotes Promiscuity." See also Goodman, Ellen, "Careless Romance--Teen-agers Get the Message--and Get Pregnant," Louisville Courier-Journal, March 19, 1985.

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March 1, 1985

Dear Sales or Station Manager,

Contraceptive advertising on TV, yes or no?

The topic -- particularly after the networks' refusal to run such ads -- has produced mixed reactions. Would your station accept such advertising on a spot-buy basis? Has it already? Those questions are the basis for the enclosed brief questionnaire. I need just a couple minutes of your time in what seems to be the first attempt to ask the nation's broadcasters how they stand on this issue.

The networks say affiliate reaction is one of their prime concerns but no one seems to have asked the affiliates or independents directly. As an academic researcher and instructor of advertising, I am free from ties to broadcasting or clients or agencies. I just want to gauge practice and reaction to this timely topic.

Your station was chosen in a random sample of all commercial U.S. TV stations. Answers will be reported in aggregate form and your answers will remain confidential. I do ask your station name, location and market size to determine if responses differ by size, location or affiliation. Please provide as much information as possible -- your answers are important!

Since ad approval depends on content, the copy for two rejected ads is provided below:

> ENCARE: (Video shows four women in chairs in studio setting) VO: When it comes to birth control, why do so many women trust Encare contraceptive inserts? Woman 1: Encare is effective. Woman 2: It doesn't have hormones. W3: I like the two-way protection. W2: Right. It even has a foaming protective barrier. and a leading spermicide. W1: Yeah, the one doctors recommend most. W4: Encare makes me feel secure. . .confident. W1: You get protection with Encare. VO: Birth control you can trust, Encare.
>
> TROJANS: (Video shows woodworking project, which turns out to be a baby cradle) VO: People today know the importance of responsible parenthood. So they plan carefully, thoughtfully and with a great deal of love. There is a time for having children and when that time comes nothing is more joyous. The makers of Trojans condoms have been helping people for over a half a century safely practice responsible parenthood.

Thank you for your time and participation in this project, which is part of a larger research project on advertising effects. If you'd like to know the results, indicate so on the questionnaire.

Sincerely,

Linda Lazier Smith
Associate Instructor, Advertising
IU School of Journalism

APPENDIX 1

NATIONAL TV STATION SURVEY ON CONTRACEPTIVE ADVERTISING

1. Has your station ever accepted contraceptive advertising? Yes No

   Are you currently running contraceptive ads? Yes No

2. Have contraceptive advertisers approached you about spot buys? Yes No

3. Does your station currently have policies or guidelines that specifically address contraceptive advertising? Yes No

4. Would you accept the Encare spot as described in the letter? Yes No

5. Would you accept the Trojans spot as described in the letter? Yes No

6. If yes to either, would you put limitations on running it? Yes No

   If yes, what limitations? _____ Time of day
   _____ Number of spots per week

   Other: _____

7. If you would not accept such advertising, why not?

   _____ Against our station policies
   _____ Don't want to offend viewers or cause viewer backlash
   _____ Subject is too personal and private
   _____ Would follow networks' lead in not accepting such products
   _____ Continue to follow former NAB Code guidelines which prohibited such ads
   _____ Strong religious element in this community
   _____ Other: _____

8. Have you ever accepted advertising from such groups as Planned Parenthood or clinics offering abortions or pro-life organizations? Yes No

9. Do you agree with the networks' decision not to run contraceptive advertising? Yes No

10. For what reason would you run contraceptive advertising? (Check the primary reason.)

    _____ Would treat it as any other advertiser/product
    _____ As long as spot was not offensive, it could provide valuable information
    _____ The social trends and sexual statistics call for such product information
    _____ The content of TV programming calls for such information
    _____ Other: _____

Please make any additional comments on the back side.

Replies will be confidential but to determine attitudinal differences, please provide as much of the following information as possible:

STATION NAME _____ CITY _____ Affiliation? _____

Your name and title (optional) _____

Market Size: (Circle one) 1-10 11-25 26-50 51-75 76-100 101-150 Over 150

Thanks so much for your time and trouble. Please return immediately in the enclosed, stamped, addressed envelope to: Linda Lazier Smith, School of Journalism, Ernie Pyle Hall, Indiana University, Bloomington, IN 47405.

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